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Family Law Review Articles

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The Treatment of Trusts in Divorce

JONATHAN W. WOLFE

Matrimonial attorneys who handle high asset cases will be confronted with a variety of complex legal and factual questions when either their client or their client's spouse is a beneficiary of trust.

- Does such an interest constitute property; is such an interest a marital asset?
- If not, can the increase in value of the spouse's interest nevertheless be a marital asset?
- Can a spouse's interest as a beneficiary of a trust be taken into account when fixing alimony and child support obligations?
- Can the non-beneficiary spouse seek to compel alimony and child support payments directly from the trust?
- How is the beneficiary spouse's interest in a trust valued for the purposes of division of marital property and/or support obligations?

The answers to these questions vary widely from jurisdiction to jurisdiction and can dramatically impact your client's high asset case. Some states, such as Colorado, have a breadth of precedent on these issues, while others, such as New Jersey, have had no reported decision on these subjects since the 1970s. Some states, such as Oregon, have an expansive concept of whether a beneficiary's interest constitutes property (regardless of whether such an interest is possessory, vested or contingent),¹ while others such as New Jersey,² Pennsylvania,³ Wisconsin,⁴ Missouri⁵ and Texas,⁶ require a spouse to have a present right to receive the trust assets for a spouse's interest to be considered acquired property. Finally, some states, such as Colorado⁷ and Massachusetts⁸ have adopted more flexible approaches based upon

an examination of the type of interest held by the beneficiary spouse in the trust.

This article provides an overview of the relevant trust provisions that impact any issue related to the treatment of a spouse's interest in a trust in divorce and focuses on the primary question of whether a spouse's status as a beneficiary of a trust constitutes an asset acquired by a beneficiary spouse.

EXAMINATION OF THE TERMS OF THE TRUST

Regardless of the jurisdiction in which you practice, the first step that must be undertaken is an examination of the specific terms of the trust. Although attorneys unfamiliar with the mechanics and terms of trusts ultimately may require assistance from a trusts and estates expert, answers to the following essential questions can be ascertained by a review of the trust instrument and are essential for evaluating your client's case.

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- Is the trust a “revocable” or “irrevocable” instrument?
 - A “revocable” trust can be revoked by the “grantor”—i.e. the person who created the trust—at any time. As such, a spouse’s interest as a beneficiary of a revocable trust is not dissimilar to being named in a parent’s Will—it is an interest that can be lost at any time.
 - An “irrevocable” trust, to the contrary, cannot be revoked by the grantor and therefore (depending on the other terms of the trust) can provide a beneficiary with a more concrete right to receive trust assets.
- Who (if anyone) is vested with the “power of appointment”?
 - The power of appointment is the right to devise by Will (or otherwise) the assets held in the trust.
 - Is the power of appointment maintained by the grantor of the trust?
 - If yes, the grantor can effectively revoke the terms of the trust upon his or her death by exercising the power of appointment and dictating the distribution of the trust assets.
 - Does the beneficiary have a lifetime power of appointment or a testamentary power of appointment?
 - A lifetime power of appointment would allow the beneficiary to distribute trust assets during her lifetime, arguably giving her effective control over the trust assets.
 - A beneficiary with a testamentary power of appointment is limited to exercising control upon her death.
- Who are the beneficiaries of the trust?
 - Is the spouse the sole beneficiary of the trust?
 - If not, who are the other beneficiaries?
 - What are the other beneficiaries’ relationships to the spouse getting divorced?
 - Are the beneficiaries treated equally under the trust?
 - If not, does the spouse getting divorced have more or less of an interest in the trust assets than other beneficiaries?
- How and to whom does the trust provide for distributions?
 - What does the trust provide for with respect to distributions of income and trust corpus to beneficiaries?
 - It is essential to closely examine the class of beneficiaries to whom distributions can be made and the type of distributions that are permissible.
 - Are there any restrictions on distributions to the beneficiary spouse?
 - Are there any fixed distributions to either the beneficiary spouse or any other beneficiary of the trust?
 - Does the beneficiary spouse have a right to receive distributions of either trust corpus or income?
- Is the trust a “discretionary” trust?
 - A discretionary trust vests a trustee with sole discretion over what distributions will be made to the beneficiaries—including the beneficiary spouse.
 - Typically, a beneficiary of a discretionary trust has no right to compel distributions absent a demonstration that the independent trustee has abused his or her discretion or acted in bad faith.
- Is the trust a “support” trust?
 - A “support” trust typically indicates that the trustee shall (or may) apply the trust assets for the care, maintenance, support and education of a beneficiary.
 - Courts have found “support” trusts to have ascertainable standards, thereby providing a beneficiary with slightly more ability to compel a distribution based on a demonstration of need.
- Is the trust a “non-discretionary” trust?
 - A “non-discretionary” trust vests a beneficiary with certain rights to receive distributions from the trust.

- As such, distributions are not controlled by an independent trustee and can be compelled by a beneficiary pursuant to the terms of the trust.
- An example of a “non-discretionary” trust is one that provides a beneficiary with the right to receive the trust assets upon reaching the age of 25.
 - Upon turning 25, the beneficiary has the *right* to receive distributions of the trust assets unfettered by any powers vested in the trustee.
- Does the trust provide for both non-discretionary and discretionary distributions?
 - Many trusts will provide for certain limited non-discretionary distributions and vest a trustee with discretion over any additional distributions.
 - For example, a trust may vest a beneficiary with an annual right to receive five percent of the trust assets and vest all other distributions to the discretion of a trustee.
 - Typically, such a right vested in a beneficiary is waived if not exercised by a beneficiary in any given year.

THE SIGNIFICANCE OF DETERMINING WHETHER THE BENEFICIARY SPOUSE HAS A PROPERTY INTEREST IN THE TRUST

After evaluating the terms of the trust—and identifying what present and future rights are possessed by the beneficiary spouse in your case—the primary legal issue will be whether the spouse’s status as a beneficiary constitutes an asset pursuant to your state law. The significance of this issue will be most apparent to any attorney practicing in a state, such as Oregon, in which gifts and inheritances—provided that they constitute an acquired asset—are not excluded from distribution upon divorce.⁹ Similarly, the importance of this issue will not be lost upon any practitioner in states such as Colorado,¹⁰ Massachusetts,¹¹ Pennsylvania,¹² or Texas,¹³ in which either the increase in value of separate property or the income generated from separate property during marriage is deemed marital property.

As a Pennsylvania Court aptly explained “only the increase in value of property actually acquired can be deemed to be marital property.” *Solomon*, 531

Pa. at 122 (emphasis added); *See also, In re Marriage of Balanson*, 25 P.3d at 42 ([S]uch appreciation is to be calculated by determining the extent to which the property’s present value at the time of the decree exceeds its value at the time of acquisition.) (emphasis added). Thus, if a beneficiary’s spouse interest does not rise to the level of a property interest, there can be no argument that (i) the interest is an asset subject to distribution in divorce, or (ii) that the appreciation of the interest or the income it generated during the marriage is marital property.¹⁴

Moreover, the answer to this question can be of great significance even for those practitioners in states such as New Jersey, that (i) exclude gifts and inheritances from property distribution,¹⁵ (ii) consider income from exempt property as exempt, and (iii) create a presumption that any increase in value is immune from distribution unless the increase is due to the efforts of the non-beneficiary spouse. For example, although it is clear that an interest in a trust is exempt from distribution under the New Jersey equitable distribution statute,¹⁶ the non-beneficiary spouse may be able to seek distribution of an increase in the value of the interest *if* such an interest constituted an asset acquired during marriage.

Example One: The Cemetery Director Husband¹⁷

- The wife is named as a beneficiary of a trust that holds shares of her family’s closely held cemetery business. The wife’s elderly mother is the income beneficiary during her lifetime, and the wife has a remainder interest in the trust assets upon her mother’s death. During the mother’s lifetime, distributions (from income and principal) may only be made at the discretion of a trustee for the mother’s care, maintenance and support.
- At the time of the parties’ marriage, the shares of the company held in trust are valued at approximately \$1 million and the company has been experiencing a significant decline. The husband—who is not a beneficiary of the trust—becomes the president of the company and earns a substantial salary in this capacity.
- Fourteen years later, after the husband has turned the company around, it is sold for \$10 million. Shortly thereafter, the wife runs off with her physical trainer and files for divorce.

- In the divorce, the husband concedes that the wife's original interest constitutes an exempt asset, but maintains that he increased the value of her remainder interest (by \$9 million) and that the increase in value is a marital asset subject to distribution.
- Does the husband have a viable claim?
- The answer will depend in substantial part on whether the wife's original interest constituted an acquired asset or a "mere expectancy."

Example Two: The Estate Planning Husband

- The wife's parents sell a family business in Europe and plan to make gifts of \$50 million to each of their four children. The husband suggests that the wife meet with a trust and estate expert, who, in turn, identifies some underlying problems with the planned transfer and recommends the establishment of foreign trusts. The husband gathers facts for the trust and estate professionals and relays their recommendations to the family's European advisors. The husband then convinces the wife that they both should be named as beneficiaries of the trust, which vest discretion over distributions to an independent trustee. The wife agrees, with the understanding that in the event they divorced, distributions would only be made to the ex-husband in an emergency. The parties are in marriage counseling two days per week when the trust is formed naming both parties as beneficiaries.
- The husband files for divorce and claims that the trust assets are subject to equitable distribution. The husband maintains that any exclusion for gifts and inheritance is inapplicable because both parties were named as beneficiaries of the trust. Alternatively, the husband maintains that even if the original trust assets are exempt, but for his efforts the assets transferred to the trusts would have been subject to approximately \$45 million of taxes over the wife's lifetime. The husband therefore claims he is entitled to \$22.5 million representing his share in the increase in value of the trust.
- Does the husband have a viable claim that the trust assets are subject to division because both parties are named as beneficiaries?

- Does the husband have a viable claim that the increase in value of the wife's interest caused by the potential tax savings constitutes divisible marital property?
- Again, the answer will in large part turn on whether either spouse has acquired a property interest in the trusts.

WHEN A SPOUSE'S INTEREST CONSTITUTES AN ASSET: VARIATIONS IN STATE LAW

As previously detailed, the answer to the fundamental question of whether a beneficiary's interest constitutes an asset will vary greatly from state to state. Although some states, such as Oregon, consider any interest in a trust to constitute property, most states either (i) require a beneficiary spouse to have a present possessory interest or right to withdraw the trust assets before their interest constitutes an asset or (ii) focus on the specific rights vested in the beneficiary spouse, with a focus on the distinction between discretionary and non-discretionary trusts.

Requirement that Beneficiary Spouse Have Present Possessory Interest or Right to Withdraw Trust Assets

The following states are among those in which an interest in a trust is not deemed an asset acquired by a beneficiary spouse unless the spouse has a present possessory right to receive the trust assets.

- **New Jersey:** In 1979, the Supreme Court of New Jersey held that a beneficiary spouse's interest in a trust does not constitute property "legally and beneficially" acquired unless the beneficiary has acquired "unimpaired control and totally free use and enjoyment" of the trust assets. *See Mey*, 79 NJ at 125.
- **Pennsylvania:** More recently, the Supreme Court of Pennsylvania similarly held that a beneficiary spouse of a trust¹⁸ does not "actually acquire" the assets in the trust until obtaining the "right to withdraw the principal of the trust." *See Solomon*, 531 Pa. at 122.
- **Wisconsin:** A beneficiary spouse does not "acquire" an interest in a trust during marriage unless she has the right to receive the corpus of the trust. *See Friebe*, 181 Wis. 2d at 293.

- **Missouri:** A beneficiary spouse only "acquired" an interest in a trust upon attaining the right to demand receipt of the trust assets. See *Moore*, 111 S.W. 3d at 530.
- **Texas:** A beneficiary spouse does not acquire an asset unless she has a right to compel distributions. See *Lipsey*, 983 S.W.2d at 351.

In these jurisdictions, courts focus on whether the beneficiary spouse has a present enforceable right to the trust assets. The New Jersey case of *Mey v. Mey* is particularly noteworthy. In *Mey*, the husband was a beneficiary of a non-discretionary trust. Under the terms of the trust established by his grandfather, he had a right to receive the trust principal at the age of 25—meaning all that was required for him to have the right to these assets was to live four years to age 25. The husband's mother was named as a trustee and had the power to invade the corpus for the care, support maintenance and education of the beneficiaries, including the husband, his mother, and his siblings. *Id.* at 123. The trust became irrevocable upon the death of the husband's grandfather, which occurred prior to the parties' marriage. The parties were married shortly after the husband turned 21 and remained married until the husband was 27, at which time his wife filed for divorce and claimed that the trust assets were part of the marital estate. *Id.* at 123. Since *Mey* was decided prior to the 1980 Amendment to the New Jersey equitable distribution statute excluding gifts from distribution, the trust assets only would have been excluded from distribution if they were "legally and beneficially" acquired prior to marriage. The husband argued that he had acquired an interest prior to the marriage, because his right to receive the trust assets became irrevocable upon the death of his grandfather prior to the marriage. The Supreme Court unanimously rejected the husband's argument and held that the husband had not "legally and beneficially acquired" an interest until turning 25—at which time his interest was transformed from a "mere expectancy" with no present right of enjoyment to complete "unimpaired control and totally free use and enjoyment." *Mey*, 79 NJ at 125.

Discretionary v. Non-Discretionary Trusts and An Examination of the Rights of the Beneficiary Spouse

Unlike those states detailed above that require a beneficiary spouse to have a present possessory interest in a trust for it to constitute an asset, some

states (such as Colorado and Massachusetts) evaluate a beneficiary's specific interests to determine whether such an interest constitutes property and focus on distinctions between discretionary and non-discretionary trusts.

- **Colorado:** In 2001, the Colorado Supreme Court addressed whether a beneficiary spouse's remainder interest in a trust constituted property. See *In Re Marriage of Balanson*, 25 P.3d at 41.
- The beneficiary spouse of the "family trust" at issue in *Balanson* (similar to *Mey*, above,) had a remainder interest subject only on her survival—i.e. she would receive the trust assets provided she did not predecease her father. During her father's lifetime, however, all income was required to be paid to her father and he had the discretion to invade the corpus for his support care and maintenance.
- The court held that a beneficiary spouse's interest in a trust does not need to be subject to present enjoyment to constitute property acquired during marriage, provided that the beneficiary has "an enforceable contractual right" to receive the trust assets in the future. *Id.*
- The court concluded that such remainder interests "are distinguishable from interests in discretionary trusts because although the value of such interests may be uncertain at the time of the dissolution of marriage, they nonetheless constitute property because they are certain, fixed interests subject only to the condition of survivorship." *Id.*
- Accordingly, the court found that unlike an interest in a discretionary trust, which would constitute a "mere expectancy," a remainder interest constituted "property" because it was "not within the discretion of the trustee to withhold." *Id.* at 41.
- Unlike the "non-discretionary" remainder interest in *Balanson*, *In Re Marriage of Jones*, 812 P.2d 1152 (Colo. 1991), addressed whether a spouse's status as a discretionary beneficiary constituted "property" under Colorado law. The trust in *Jones* was a discretionary "support trust"—i.e. it provided for distributions at the discretion of a trustee for the wife's support.
- The Colorado Supreme Court concluded that the "fact that the trustees are limited to

disbursing funds to the wife for only her support, if they decide to disburse funds at all, does not deprive the trust of its discretionary character." *Id.* at 1156.

- Accordingly, the court concluded that unlike "nondiscretionary" trusts, which provide the beneficiary with a "vested benefit not within the discretion of the trustee to withhold," the wife's interest in a discretionary trust amounted to nothing more than a "mere expectancy" and cannot be considered the separate property of a beneficiary for the purposes of equitable distribution. *Id.*
- **Massachusetts:** The Massachusetts Supreme Court has similarly held that when a spouse's "rights in the trust property are present, enforceable, and valuable ... (his or her) beneficial interest in the trust property is subject to equitable assignment..." *Lauricella v. Lauricella*, 565 N.E.2d 439, 440 (1991)
- In *Lauricella*, the beneficiary spouse had an interest in a trust "subject to divestment only if [the husband did] not survive until the trust terminate[d] according to its terms." Based upon the husband's young age, the court concluded that the "likelihood is that he will survive to receive his share...." *Id.*
- The court concluded that the fact that "valuation of the interest may be difficult does not alter its character as a divisible asset." *Id.*
- Massachusetts courts similarly recognize the fundamental distinction between discretionary and non-discretionary trusts. *See D.L. v. G.L.*, 61 Mass. App. Ct. 488, 811 N.E.2d 1013 (Mass. App. Ct. 2004).
 - In *D.L.*, the court cautioned the following with respect to discretionary trusts:
- "[W]hile a judge is not necessarily precluded from including within the marital estate ... a party's beneficial interest in a discretionary trust ... because of the peculiar nature of such a trust, the trust instrument and other relevant evidence must be examined closely to determine whether that party's interest is too remote or speculative to be so included."
 - The *D.L.* Court further analyzed certain other "non-discretionary" remainder trusts, which it similarly concluded were "too remote or speculative" to constitute property. *Id.* at 500-501.

VALUATION OF A SPOUSE'S INTEREST IN A TRUST

Once an interest in a trust is deemed to constitute an asset, courts will be confronted with the difficult task of valuing the beneficiary spouse's interest. This can be quite a difficult task depending on the terms of the trust, including, *inter alia*, the number of beneficiaries, the right of other beneficiaries to receive trust income or principal, the power of appointment and the possibility of complete divestment of the spouse's interest.¹⁹

When a spouse has a remainder interest subject only to survival, courts frequently will rely upon actuarial testimony to ascertain life expectancy and likelihood of obtaining the trust assets. The following guidelines, identified by the Colorado courts, provide trial courts with broad discretion to determine appropriate valuation methods:

- A trial court may value beneficial interests in trusts in the same actuarial manner utilized for federal transfer tax purposes.²⁰
- A trial court may order that a percentage of trust distributions received by the beneficiary's spouse subsequent to a legal separation or dissolution of the marriage be paid to the non-beneficiary spouse.²¹
- A trial court may utilize other unspecified valuation methods based upon the court's "experience insight and knowledge."²²
- A trial court may consider a variety of circumstances, including actuarial information, concerning the life expectancy of other beneficiaries of the trust, and the extent to which other beneficiaries of the trust eligible for distribution may require principal distributions.²³

The overwhelming authority further provides that regardless of whether the beneficiary is entitled to mandatory income distributions or discretionary distributions, the trial court must consider if the interest in the trust should be discounted to its present value for the period of time until the interest becomes possessory.

- *See e.g. In Re Marriage of Mohrlang*, 85 P.3d 561, 563 (Colo. Ct. App. 2003) (holding that the trial court "should have considered actuarial information concerning the life expectancy of husband's parents and ... the

likelihood that the trustee would invade the trust corpus in the future.”).

Courts also can look to pension plan and stock option cases for guidance concerning the appropriate manner in which to value a beneficiary's interest in a trust.

- See e.g. *Chilkott v. Chilkott* 607 A.2d 883, 885 (Vt. 1992) (The difficulties in valuing the husband's interest in the trust are similar to those encountered in valuing a pension because the value of the pension is contingent on the worker reaching retirement.)
- See e.g. *Davidson v. Davidson*, 474 N.E.2d 1137, 1145 (Mass. Ct. App. 1985) (the court noted that where there is “no spendthrift or other limitation and actuarial evidence as to valuation is available, guidance in crafting creative judgments may be found in cases dealing with pension interests”).

CONCLUSION

Because of the scarcity in some jurisdictions of any relevant precedent and the widely divergent decisions from those courts across the country that have addressed these issues, disputes concerning a spouse's interest in a trust can substantially increase both the cost and length of a divorce proceeding. Moreover, because the dispute surrounding a spouse's interest in a trust can be the most substantial issue in a case, the outcome of the type of questions detailed herein will be of utmost importance to your client. As such, it is essential that these issues be addressed and analyzed at the outset of any case in which either spouse is a beneficiary of a trust. A practitioner unfamiliar with the treatment of trusts in divorce should seriously consider consulting either a trusts and estates professional or a matrimonial attorney with experience litigating these issues. Finally, unlike many other arrears of family law, many of these issues can be resolved as a matter of law, and practitioners should not hesitate to seek such rulings from the court as early as is feasible in the litigation.

NOTES

1. See *In Re Marriage of Taylor*, 856 P.2d 325, 328 (Or. App. 1993); *In re Marriage of Benston*, 656 P.2d 395, 396 (Or. App. 1983).

2. See *Mey v. Mey*, 79 N.J. 121, 125, 398 A.2d 88 (1979).
3. See *Solomon v. Solomon*, 531 Pa. 113, 122, 611 A.2d 88 (1992).
4. See *Friebel v. Friebel*, 181 Wis. 2d 285, 293, 510 N.W.2d 767 (Wis. App. 1993).
5. See *Moore v. Moore* 111 S.W. 3d 530 (S.D. Mo. 2003).
6. See *Lipsey v. Lipsey*, 983 S.W.2d 345, 351 (Tex. Ct. App. 1998).
7. See *In re Marriage of Balanson*, 25 P.3d 28, 42 (Colo. 2001); *In Re Marriage of Jones*, 812 P.2d 1152 (Colo. 1991).
8. See *D.L. v. G.L.*, 61 Mass. App. Ct. 488, 811 N.E.2d 1013 (Mass. App. Ct. 2004); *S.L. v. R.L.*, 774 N.E.2d 1179, 1182 (Mass. App. Ct. 2002).
9. See e.g., *In Re Marriage of Taylor*, 856 P.2d at 328; O.R.S. § 107.105.
10. See *Balanson*, 25 P.3d at 42.
11. See *D.L.*, 61 Mass. App. Ct. at 488.
12. See *Solomon*, 531 Pa. at 122.
13. See *Lipsey*, 983 S.W.2d at 351.
14. The answer to this question similarly will have substantial impact on whether the non-beneficiary spouse may maintain a claim for alimony and/or child support against the beneficiary spouse and/or whether the beneficiary spouse may maintain a claim for alimony. See e.g. *In re Marriage of Rhinehart*, 704 N.W.2d 677, 680-82 (Iowa 2005) (holding spouse's interest in a discretionary trust was not a financial resource for purposes of determining amount of alimony to which she was entitled.); *Read Testamentary Trust v. US*, 169 F.3d 243 (5th Cir. 1999) (holding beneficiary's interest in a discretionary trust could not be reached to satisfy an alimony claim even though applicable law provided that the alimony claim could be satisfied by a “beneficiary's interest in the trust income and principal.”); *Howard v. Spragins*, 350 So.2d 318 (Ala. 1977) (“In a true ‘discretionary trust,’ the general rule is that the beneficiary's interest is not subject to a claim for child support”); but see *Ventura County Dep't of Child Support Serv v. Brown*, 117 Cal. App. 4th 144 (Cal. App. 2004) (compelling trustee to exercise discretion to make distributions to provide for the support of the beneficiary's children and holding that failure to do so constituted bad

faith); see generally Trust Income Or Assets As Subject To Claim Against Beneficiary For Alimony, Maintenance, Or Child Support, 91 A.L.R.2d 262 (American Law Report 2d 1963) ("The interest of a beneficiary in a true discretionary trust is not subject to claims for alimony, maintenance, or child support where neither the wife nor the child of the beneficiary is a beneficiary of the trust.").

15. See N.J.S.A. 2A:3-23 (property that is "legally or beneficially acquired during marriage by either party by way of gift, devise, or intestate succession" is excluded from equitable distribution).

16. See Winters and Baldwin, *New Jersey Practice* § 35.16 (West 1999) ("A trust interest basically is created by gift whether inter vivos or testamentary and is therefore excluded from equitable distribution pursuant to N.J.S.A. 2A:3-23").

17. The examples detailed are taken from cases handled by the author of this article. Some facts have been altered for the purpose of illustration.

18. Pursuant to the terms of the trust agreement, the wife and her three sisters were each entitled to one-fourth interest in the trust. At all times, the wife was entitled to

income from her trust, but until she attained age 35, she possessed only a limited right to withdraw up to \$6,000 of the principal. Upon attaining age 35, the wife was entitled to withdraw up to one-half of the principal. Upon attaining age 40 she was entitled to withdraw the remaining principal and to terminate her trust. The court held that an increase in value of the wife's trust prior to her 35th birthday was not marital property as the wife did not obtain sufficient ownership and control over the principal until she attained age 35. Further, the court held that only the interest in value of that one-half interest in the principal occurring after her 35th birthday was marital property. *Solomon v. Solomon*, 531 Pa. 113 (1992)

19. See generally, Chorney, Marc, *Interests In Trusts As Property in Dissolution of Marriage: Identification and Valuation*, 40 Real Prop. Prob. & Tr. J. 1, at *22-23 (2005)

20. See *Jones*, 812 P.2d at 1160 (Quinn, J. dissenting).

21. See *Bolanson*, 25 P.3d at 42.

22. See *Jones*, 812 P.2d at 1160.

23. See *Balanson*, 25 P.3d at 43.